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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1314

SOUTHERN PACIFIC COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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No. 1314

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Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Southern Pacific Company, a corporation, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered on January 6, 1947, and order overruling plaintiff's motion for new trial entered on March 3, 1947, in the above entitled case, No. 46236, in the Court of Claims.

Summary Statement of the Case

In 1942 and 1943, petitioner, a common carrier by railroad, performed transportation service for the United States by carrying foodstuffs and supplies procured and shipped by the War Relocation Authority[1] to relocation

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[1] An agency created by Executive Order No. 9102, March 18, 1942, as a part of the Office for Emergency Management in the Executive Office of the President. 7 F. R. 2165.

centers, for use by Japanese civilian evacuees from military areas on the Pacific coast. The foodstuffs and supplies included in these shipments are described in Finding 15 (R. 60). They included foodstuffs of all kinds, tools and building material, household equipment and furnishings, agricultural equipment and supplies, and other equipment and supplies for civilian community use.

Petitioner billed the transportation charges at the applicable commercial rates. Payment was made by the Government at lower net rates constructed by making land-grant deductions from the applicable commercial rates, *i. e.* at net land-grant rates. Petitioner thereupon brought this action to recover the difference between net land-grant rates as paid, and the full commercial rates claimed.

The Court of Claims (Judge Littleton dissenting) held that the evacuation of the Japanese civilian population from military areas on the Pacific coast having been determined to be a matter of military necessity, the consequent relocation and maintenance of the evacuees at relocation centers, following the evacuation, were equally a matter of military necessity, and that therefore the shipments in question—although handled by a civilian agency of the Government and intended for use by civilians—were shipments of military property moving for military and not for civil use.

Statute Involved

The statute in question in Section 321(a), Title III, Part II, of the Transportation Act of 1940; Act of September 18, 1940, c. 722, 54 Stat. 898; 49 U. S. Code. Sec. 65(a):

> "Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United

States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty: * * *"

Questions Presented

1. Whether the shipments in question—consisting of foodstuffs and articles and supplies procured and shipped by the War Relocation Authority and intended for use by Japanese civilian evacuees at relocation centers administered by the War Relocation Authority—were shipments of military property of the United States moving for military and not for civil use, in the sense of Section 321(a) of the Transportation Act of 1940.

2. Whether the Court of Claims has made adequate and correct findings of fact on the evidence and record before the court, as requested by petitioner.

Specification of Errors

The Court of Claims erred:

1. In holding that the shipments in question were shipments of military property of the United States moving for military and not for civil use, within the meaning of Section 321(a) of the Transportation Act of 1940.

2. In failing to find as a fact (preferably as a part of Finding 9), as requested by petitioner, the following:

> "In his final report (plaintiff's Exhibit No. 1) the Commanding General stated:
>
> 'Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger

of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.' "

3. In failing to include in Finding 10, in referring to the agreement between the War Department and the War Relocation Authority, a finding that the agreement recited that the War Relocation Authority was an independent establishment created by Executive Order of the President, so that the third sentence of Finding 10 will read, as requested by petitioner, as follows:

"The agreement, which appears on page 239 of plaintiff's exhibit No. 1 and is made a part hereof by this reference, recited that [the War Relocation Authority is an independent establishment created by Executive Order of the President, No. 9102 dated March 18, 1942, with] the primary objective of relieving the military establishment of the burden of providing for the relocation of persons excluded from military areas by order of any designated military commander and that the emphasis in all War Relocation Authority activities would be increasingly to alleviate the drain on military resources in regard to all phases of evacuation and relocation."

4. In failing to find as a fact in lieu of subparagraph (5) of Finding 10, as requested by petitioner, the following:

"(5) From the date of opening, or the date on which the War Relocation Authority began the operation of any Relocation Center, as the case might be, the War Department would transfer accountability for all such equipment and property to the War Relocation Authority and the Authority would assume accountability for all such equipment and property and would thereafter

maintain and replace all such equipment and property, including subsistence, and would procure whatever additional supplies, subsistence and equipment it might require, with the understanding that the Authority could effect its procurement through War Department agencies, the cost to be charged to Relocation Authority appropriation."

5. In failing to find as a fact (preferably as a part of Finding 11), as requested by petitioner, the following:

> "The Tule Lake relocation center was opened by the War Relocation Authority on May 27, 1942."

6. In failing to make an additional finding, as requested by petitioner, as follows:

> "The War Relocation Authority was created and operated as a civilian agency of the Government to administer the relocation centers established for persons of Japanese ancestry who were evacuated from military areas pursuant to Executive Order No. 9066. Its functions and duties were civilian in character, as distinguished from military."

7. In finding as a fact (Finding 19) that the shipments in question were military property of the United States moving for military and not for civil use, over petitioner's exception that Finding 19 is a conclusion of law and not a finding of fact.

Reasons for Allowance of the Writ

On March 3, 1947, this court decided *United States* v. *Powell et al.*, and *United States* v. *Atlantic Coast Line R. Co.*, Nos. 56 and 57, and *Northern Pacific R. Co.* v. *United States*, No. 400, cases which involved the construction of Section 321(a) of the Transportation Act of 1940.

In the *Powell* case, this court held that Section 321(a) distinguishes "military or naval" use from "civil" use and

must be construed to preserve that distinction, and that the shipments there in question were not shipments of military property for military use. In the *Northern Pacific* case, this court further considered the scope of the exception in favor of military and naval movements and held that the shipments there in question were shipments of military property for military use.

The case here presented involves the application of Section 321 (a) to shipments made by the War Relocation Authority of foodstuffs and supplies for use by Japanese civilian evacuees from military areas who were detained in relocation centers administered by the War Relocation Authority during the period of its activity, from March 18, 1942, when it was created by executive order, until the latter part of 1944. During that period ten relocation centers were established and operated in California, Utah, Arizona, Idaho, Colorado, Wyoming and Arkansas, and a large volume of supplies of all kinds were shipped by railroad and truck to all those centers. On all such movements the Government has claimed land-grant rates on the ground that the shipments were military property moving for military and not for civil use.

Petitioner submits that the decision of the Court of Claims is in conflict with the decision of this court in the *Powell* case, that it is important in the settlement and disposition of similar cases now pending in the Court of Claims and in other courts that the scope of the exception in favor of military and naval movements be clearly defined, and that the writ of certiorari herein prayed should be allowed.

Respectfully submitted,

C. O. Amonette,
Lawrence Cake,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1314

SOUTHERN PACIFIC COMPANY,
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vs.

THE UNITED STATES,
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Claims is reported in —F. Supp. —, and is included in the record herein (R. 62).

Jurisdiction

The judgment of the Court of Claims was entered on January 6, 1947 (R. 66), and motion for new trial was overruled on March 3, 1947. The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 939, as amended; 28 U. S. Code, Section 288.

Statement of the Case

The case is stated in the petition for certiorari.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that the shipments in question were shipments of military property of the United States moving for military and not for civil use, within the meaning of Section 321(a) of the Transportation Act of 1940.

2. In failing to make adequate and correct findings of fact, as requested by petitioner and based on the evidence and record before the court, as specified in the petition for certiorari.

Outline of the Argument

I. The articles and supplies in question were not military property moving for military use in the sense of the Transportation Act of 1940. On the contrary, they were shipments of civilian supplies for civilian use.

The War Relocation Authority was a civilian agency. It was created by executive order as a part of the Office for Emergency Management in the Executive Office of the President. Its origin, purpose and character are stated in detail in Lt. General DeWitt's Final Report on the Japanese Evacuation from the West Coast in 1942.[2] This report was introduced in evidence and has been certified as an additional part of the record pursuant to Rule 99 (a) of the Court of Claims.

In this report the first three paragraphs of Chapter V, entitled Separation of Jurisdiction over Evacuation and

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[2] A report submitted by Lt. General DeWitt, Commanding General, Western Defense Command, to the Chief of Staff, U. S. Army, and by the latter submitted to the Secretary of War, and printed as a public document, entitled Final Report Japanese Evacuation from the West Coast 1942. (Government Printing Office: Washington: 1943.)

Relocation, pages 50-51, state the initial problem and the solution decided upon, in part as follows:

"When it became finally evident toward the end of February that a complete evacuation of all persons of Japanese ancestry from Military Area No. 1, and ultimately from the California portion of Military Area No. 2, would be ordered, discussions were initiated in Washington as to whether a separate agency should be created to undertake evacuee supervision and relocation after the Army had attained its objective. The primary basis for these discussions was that Army resources should not be expanded in any direction not essential to the military aspects of the successful prosecution of the war. The Attorney General and other representatives of the Justice Department were also concerned with several post-evacuation consideration, particularly those revolving around the civil rights of American-born Japanese. Justice Department Officials therefore urged the establishment of a separate civilian agency to undertake the post-evacuation phases of relocation. The Assistant Secretary of War, the Director of the Bureau of Budget and the Attorney General all participated in the consideration of this problem.

"The desirability of establishing such an operating agency was generally agreed to when the Assistant Secretary of War came to the West Coast for a survey of the situation.

• • • • • • •

"Mr. Milton S. Eisenhower, then Assistant to the Secretary of Agriculture, joined the party as he had participated in the Washington discussions concerning the proposed relocation agency. Mr. Eisenhower returned to Washington after having engaged in discussions with the Commanding General, the Assistant Secretary of War and other officials about March 11, 1942. Following his return, Executive Order of the President No. 9102 was published on March 18th.

> Under its terms, War Relocation Authority was established in the Office for Emergency Management in the Executive Office of the President. Mr. Eisenhower was named as its first Director. Broad powers were accorded. Primarily, however, the new agency became responsible for 'the relocation (of evacuees) in appropriate places, providing for their needs in such manner as may be appropriate, and supervising their activities.' Its power, authority and responsibility are clearly expressed in the order."

The history of the War Relocation Authority as shown by its published reports and by a wealth of material in numerous government reports, of which the courts will take judicial notice, shows the essentially civilian character of its work and activities. The program included plans for evacuee employment and for finding and creating suitable work opportunities, in agriculture, in simple manufacturing, and in community services, and plans for education, medical care, community government and other activities. Such activities included day nurseries and schools for children, college extension courses and adult education classes, the publishing of several newspapers, amusements, and other similar activities.

The appropriations for the War Relocation Authority were separate and distinct from the appropriations for the War and Navy Departments, the War Relocation Authority being provided for out of appropriations for the Executive Office of the President. The transportation charges on the shipments in question, for example, to the extent paid, were paid, out of the appropriation for the Executive Office of the President provided by the Act of July 25, 1942, c. 524, 56 Stat. 704, 709, cited as the First Supplemental National Defense Appropriation Act 1943.

2. The shipments in question were of articles and supplies essentially civilian in character *and intended for*

civilian use. This is an unavoidable conclusion from the facts found by the Court of Claims and from the history of the evacuation and relocation of these people of which this Court will take judicial notice.

The articles and supplies in question are described in Finding 15. They included foodstuffs, tools and building material, household equipment and furnishings, agricultural equipment and supplies, and other equipment and supplies for civilian community use.

It would be difficult to describe articles more non-military in character. It does not help the Government's case to say that such articles, if procured and used by the Army and Navy, would be military or naval property. The articles and supplies here in question were not so procured and used, but were exclusively for use by civilians—that is, those people of Japanese racial stock, some of them aliens and some American citizens, who were evacuated from the Pacific Coast in 1942.

The articles and supplies in question were not only for the purpose of feeding and maintaining these people but also to enable them to engage in useful civilian occupations. This objective of the War Relocation Authority is stated in nearly all its reports and publications. For example, in the First Quarterly Report (March 18 to June 30, 1942) it was stated:

> "The tenth of a million people involved in the West Coast evacuation—roughly two-thirds of whom are American citizens—have only one readily distinguishable characteristic in common: Japanese racial stock. In practically every other respect, they are as heterogeneous a group as—for example—the 110,000 residents of the State of Nevada. Occupationally, they run the gamut from learned doctors of philosophy to muscular young men without special training or skills. The group includes doctors, lawyers, and business executives as well as farmers, fishermen, and truck drivers.

> Despite a marked concentration in some occupations (such as agriculture and retail trade) and a subnormal proportion in others (such as engineering), the evacuee population as a whole embraces virtually every major occupational group.
>
> "Effective employment of this sizable reservoir of manpower and talent has been one of the most pressing tasks of the War Relocation Authority. Mass idleness, clearly, would be damaging to evacuee morale, costly to the tax-payer, and inexcusable, in a national period of decreasing manpower and all-out production. Almost since March 18, the Authority has concentrated a major share of its attention on finding and creating suitable work opportunities for the evacuees and on gearing their activities into the war effort of the Nation."

Such work opportunities were in agriculture, simple manufacturing, community consumer enterprises, and community services.

3. The basis for the conclusion reached by the Court of Claims seems to be, as stated in the court's opinion (R. 65-6), that:

> "The primary purpose of excluding the evacuees from designated military areas did not end merely by escorting them from those areas and preventing their return.
>
> • • • • • • •
>
> "We think the military effort extended to the relocation centers; that the military arm was not relaxed after the evacuees were relocated, and that the use of civilian agencies to care for these people did not make military necessity something other than what it was from beginning to end."

This is a statement of opinion, we submit, contrary to the opinion of the military commander himself who ordered

the evacuation, Lt. Gen. DeWitt who in his Final Report said:

> "Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration. Although the initial recommendation of February 14, 1942 (appendix to chapter 3, page 33, supra) contemplated the internment of alien Japanese, this was abandoned as a method of operation. Once authority had been granted to set the program in motion, the Commanding General encouraged and facilitated a voluntary exodus with free choice of destination in the interior of persons of Japanese ancestry."

It is true that the establishment of relocation centers and the necessity of feeding and clothing and maintaining these people would not have been necessary if there had been no war and that what the War Relocation Authority was called upon to do was one of the results of our being at war. But the same can be said of practically every civilian activity of the Government during the war. Thousands of civilian employees were added to the Government payroll during the war and many additional civilian agencies were created, such as the Office of Price Administration, the War Production Board, the Office of Defense Transportation, and so on, all because we were at war, but no one has yet contended that the operation of those civilian agencies in time of war made them a part of the military establishment.

As this court said in the *Powell* case,

> "When the resources of a nation are mobilized for war, most of what it does is for a military end—whether

it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote Section 321 (a)."

II. The Court of Claims failed to make adequate and correct findings of fact, as requested by petitioner.

In support of these specifications of error petitioner has brought up as a part of the record Lt. Gen. De Witt's Final Report on Japanese evacuation from the West Coast 1942, introduced in evidence as plaintiff's Exhibit No. 1. In the court below, all petitioner's requests for findings of fact, as made in exceptions to the report of a commissioner and in petitioner's motion for new trial, were based on that report.

Specification 2. The finding requested by petitioner as a part of Finding 9, and denied by the Court of Claims, is the statement made by the Commanding General of the Western Defense Command that military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior. This statement of the Commanding General, quoted from the Final Report (Plaintiff's Exhibit No. 1), is a fact to which petitioner is entitled as a part of the factual background.

Specification 3. The amendment of the third sentence of the first paragraph of Finding 10, as requested by petitioner, is for the purpose of including the clause within brackets, to the effect that the agreement between the War Department and the War Relocation Authority recited that the War Relocation Authority was an independent establishment created by Executive Order of the President. The clause omitted is as much a part of the agreement as any other part. In fact, it constitutes the opening clause of the preamble. Its omission from the court's finding of

the purpose of the agreement makes the finding less than a complete and objective statement of fact.

Specification 4. The amendment of sub-paragraph (5) of Finding 10, as requested by petitioner, is for the purpose of making this finding a more accurate statement of the agreement between the War Department and the War Relocation Authority. Final Report (Plaintiff's Exhibit No. 1), pp. 237-247.

Specification 5. The finding requested by petitioner as a part of Finding 11, is simply that the Tule Lake relocation center was opened by the War Relocation Authority on May 27, 1942. Inasmuch as Finding 11 includes a statement that the Manzanar relocation center was transferred to the War Relocation Authority on June 11, 1942, it should also show the date on which the Tule Lake relocation center was opened by the War Relocation Authority.

Specification 6. The additional finding requested by petitioner, and denied by the Court of Claims, to the effect that the War Relocation Authority was created and operated as a civilian agency of the Government and its functions and duties were civilian in character as distinguished from military, is fully supported by Lt. General DeWitt's Final Report and other material of which the court will take judicial notice.

Final Report, pp. 50-51, 327, 532.

> Circular No. 19, Headquarters Western Defense Command and Fourth Army, 17 September 1942 (Final Report cited, pp. 527, 528):
>
> "2. Pursuant to the provisions of Executive Order No. 9102, March 18, 1942, the War Relocation Authority has been established as a *civilian agency* to assist the military in the evacuation of certain persons; * * *"
>
> "5. Relocation centers are operated by *civilian management* under the War Relocation Authority. * * *"

Fourth Interim Report (Findings and Recommendations on Evacuation of Enemy Aliens and Others from Prohibited Military Zones) of Select Committee Investigating National Defense Migration pursuant to H. Res. 113; H. Rept. 2124, 77th Cong., 2nd Ses. (May 1942) p. 17;

"The far-reaching decision to evacuate created a multitude of problems respecting the disposition of the evacuees. Under present plans, the Army controls the evacuee up to the reception center; at that point the *civilian agencies* of the Federal Government are supposed to assume control."

Ex parte Mitsuye Endo, 323 U. S. 283.

Specification 7. Petitioner submits that this finding is not properly a finding of fact, and, moreover, that it is plainly erroneous whether considered as an ultimate finding of fact or as a conclusion of law.

Conclusion

Petitioner submits that on the record and in view of the history and purpose of the War Relocation Authority, the articles and supplies in question were not military property moving for military use in the sense of the Transportation Act of 1940, but, on the contrary, were shipments of civilian supplies for civilian use.

The conclusion of the Court of Claims, as stated in the majority opinion (R. 65), that "the primary purpose of escorting the evacuees from designated military areas did not end by merely escorting them from those areas and preventing their return" and that, therefore, the shipments in question—although handled by a civilian agency and intended for civilian use—were shipments of military property for military use, is without any support whatever, either in the facts or as a conclusion of law.

It is a conclusion, moreover, in conflict with the decision of this court in *United States* v. *Powell*, No. 56, decided March 3, 1947, where this court held that the Transportation Act of 1940 distinguished "military or naval" use from "civil" use, and must be construed to preserve that distinction.

Respectfully submitted,

C. O. Amonette,
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Statutes:

Act of March 21, 1942, 56 Stat. 173, 18 U. S. C., Supp. V, 97 — 4, 9, 14

Act of December 12, 1945, c. 573, § 1, 59 Stat. 606, 49 U. S. C., Supp. V, 65(a) — 18, 20

Military Appropriation Act, 1945, 58 Stat. 573, 593 — 15

Military Appropriation Act, 1946, c. 265, 59 Stat. 384 — 15

Military Appropriation Act, 1947, Public No. 515, 79th Cong., 2d Sess., "Government and Relief in Occupied Areas" — 15

Transportation Act of 1940, Sec. 321, 54 Stat. 898, 954, 49 U. S. C. 65 (a) — 2, 3, 12, 13, 18, 20

Miscellaneous:

Dembitz, *Racial Discrimination and the Military Judgment*, 45 Col. L. Rev. 175, 221 — 17

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1314

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 62–66) is reported at 69 F. Supp. 208.

JURISDICTION

The judgment of the Court of Claims was entered on January 6, 1947 (R. 66). The petition for a writ of certiorari was filed on May 2, 1947 (R. 69). The jurisdiction of this Court is in-

voked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether Government-owned property, purchased by the War Relocation Authority for the maintenance of persons of Japanese ancestry held at relocation centers and for the operation of those centers in accordance with the program of the War Relocation Authority, and shipped on Government bills of lading over petitioner's railroad in 1942 and 1943, constituted "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, and was therefore entitled to move at land-grant rail rates.

STATUTES AND EXECUTIVE ORDER INVOLVED

The relevant portions of the Transportation Act of 1940, 54 Stat. 898, 49 U. S. C. 65 (a) and the Act of December 12, 1945, c. 573, § 1, 59 Stat. 606, are set forth in Appendix A, p. 20. The relevant portions of Executive Order No. 9066 of February 19, 1942, 7 Fed. Reg. 1407, are set forth in Appendix B, pp. 21–22.

STATEMENT

Petitioner is a land-grant railroad, qualified to receive the higher rates authorized by Section 321 (a) of the Transportation Act of 1940, 54 Stat.

954, Appendix A, *infra*, p. 20.[1] The shipments in controversy, the property of the United States, were moved by petitioner over its own lines and in participation with other interstate common carriers, on Government bills of lading, or upon commercial bills of lading for which Government bills of lading were later substituted (R. 60). They consisted of articles purchased by the War Relocation Authority for the operation of the Tule Lake and Manzanar Relocation Centers at Newell and Manzanar, California, and for the maintenance of persons of Japanese ancestry who were held there (R. 60) pursuant to the wartime evacuation program (R. 56–58).

Executive Order No. 9066 of February 19, 1942, 7 Fed. Reg. 1407, Appendix B, *infra*, pp. 21–22, authorized and directed the Secretary of War, and the military commanders appointed by him, to prescribe military areas in such places and to such extent as might be necessary in the successful prosecution of the war; to exclude any and all persons from military areas; to impose restric-

[1] The court below found that prior to any of the shipments here involved, petitioner and all participating carriers, and all carriers over routes with which the routes of these shipments were or might be equalized from the standpoint of net charges to the United States for the service of transportation, filed with the Secretary of the Interior, pursuant to Section 321 (b) of the Transportation Act of 1940, releases of all claims to land or interests therein granted in aid of the construction of any of their lines of railroad, and all such releases were accepted and approved by the Secretary (R. 51–52).

tions on the right of any person to enter or leave such military areas; and to provide transportation, food, shelter, and other accommodations for the persons excluded to the extent deemed necessary for accomplishing the purpose of the order and until other arrangements were made (R. 63–64). All executive departments, independent establishments, and other federal agencies were directed to assist the Secretary of War and the military commanders in carrying out this order (R. 64). Congress, by the Act of March 21, 1942, 56 Stat. 173, 18 U. S. C., Supp. V, 97a, provided that any person who entered, remained in, left, or committed any act in any military area or zone prescribed under the authority of an Executive Order of the President, or by order of the Secretary of War, or any military commander designated by him, contrary to the restrictions applicable to the zone or area, or contrary to the order of the Secretary of War or appropriate military commander, would be guilty of a misdemeanor and punishable by fine or imprisonment or both.

Thereafter, the Commanding General of the Western Defense Command,[2] the military com-

[2] The Western Defense Command comprised the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah, Arizona, and the Territory of Alaska (R. 53). Subsequently, the Western Defense Command was divided into two military areas. Military Area No. 1 roughly comprised the western half of the States of Washington, Oregon, California, and the southern half of Arizona, and Military Area No. 2 comprised the remaining portions of the states (R. 53).

mander designated to carry out the duties and responsibilities imposed by Executive Order 9066, determined that the evacuation of all persons of Japanese ancestry from strategic areas on the West Coast was a military necessity (R. 53).[3] Accordingly, between March 2, 1942, and January 25, 1943, he issued a series of public proclamations, civilian exclusion orders, and civilian restrictive orders which prescribed military areas in the states comprising his command; provided regulations governing the conduct of enemy aliens in such areas; directed the exclusion of all persons of Japanese ancestry from specified zones in military areas; and established and defined the boundaries of certain war relocation project areas to which all persons of Japanese ancestry were to be removed and within which they were required to remain unless specifically authorized by the Commanding General to leave (R. 53).[4]

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[3] At the time Executive Order No. 9066 was promulgated, more than 115,000 persons of Japanese ancestry resided in communities along the Pacific Coast, many of which communities were adjacent to war plants and other vital war installations (R. 53).

[4] Public Proclamation No. 1 of March 2, 1942, 7 Fed. Reg. 2320, which established Military Areas No. 1 and 2 (see footnote 2, *supra*, p. 4), set forth regulations governing the conduct of enemy aliens and all persons of Japanese ancestry residing in Military Area No. 1 and gave notice that such persons or classes of persons as the situation required would be excluded from all of Military Area No. 1 and designated zones in Military Area No. 2 by proclamations to be issued thereafter (R. 53–54). On March 11, 1942, the Command-

On March 18, 1942, Executive Order No. 9102, 7 Fed. Reg. 2165, established the War Relocation Authority in the Office for Emergency Management of the Executive Office of the President (R. 54). By this order, the Director of War Relocation was authorized and directed to formulate and effectuate a program for the removal from areas prescribed by the Secretary of War of all persons or classes of persons designated by Executive Order No. 9066, and for their relocation, maintenance, and supervision; to accomplish all evacuation not undertaken by the War Department and to relocate and provide for the needs and supervision of the activities of such evacuees; to provide for the employment of such evacuees in useful work and to safeguard the public interest in the private employment of such persons; to prescribe regulations for the execution of the relocation program and to coordinate relocation activities with evacuation operations by consultation with the Secretary of War regarding such regulations; and to secure the prior approval of the Secretary of War or

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ing General created the Wartime Civil Control Administration as an operating agency of his command to carry out assigned missions of civilian control (R. 54). This agency initiated its operations with a directive from the Commanding General to provide for the evacuation of all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2 with a minimum of economic and social dislocation, a minimum use of military personnel and maximum speed, and, initially, to employ all appropriate means to encourage voluntary migration (R. 54).

the appropriate military commander before undertaking any evacuation activities in military areas (R. 54–55).

The program of controlled evacuation[5] from strategic West Coast areas was begun on March 29, 1942, following the issuance by the Commanding General of the first of a series of 99 civilian exclusion orders (R. 55). Under this program, Japanese living in areas to be evacuated were required to register on specified dates at civil control stations which were operated by the Commanding General (R. 56). They were then transported by military authorities to assembly centers which were constructed and maintained by the Army to provide food and shelter for the evacuees pending their subsequent transfer to various war relocation centers (R. 56).

On June 27, 1942, by Public Proclamation No. 8, 7 Fed. Reg. 8346, the Commanding General declared that the situation then existing in Military

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[5] Following the issuance of the first public proclamation on March 2, 1942 (see footnote 4, *supra*, p. 5), and until March 24, 1942, there was a voluntary migration of about 9,000 persons of Japanese ancestry from the Western Defense Command to interior states. By the later date, because of the opposition registered by officials of the interior states to uncontrolled Japanese migration, the Commanding General determined that all subsequent evacuation should be conducted under a plan which provided for the removal by the Army of all persons of Japanese ancestry from strategic West Coast areas and their eventual settlement in relocation centers operated and controlled by the War Relocation Authority. (R. 55.)

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Areas One and Two, the subdivisions of the Western Defense Command,[6] required as a military necessity that all persons of Japanese ancestry who had been evacuated from restricted zones in military areas should be removed to relocation centers and that such centers be designated as war relocation project areas (R. 58). The relocation centers consisted of projects, or temporary communities, designed to accommodate approximately 10,000 persons and to provide food, clothing, shelter, medical care, education, and recreation for the evacuees and, like the assembly centers, were constructed and equipped by the Army (R. 56). They were, however, operated by the War Relocation Authority in accordance with an agreement of April 17, 1942, between the War Department and the Authority (R. 56–58).[7]

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[6] See footnote 2, *supra*, p. 4.

[7] This agreement set forth the extent to which the War Department and the Relocation Authority would participate in the Relocation Program (R. 56). It recited that the primary objective of the War Relocation Authority was to relieve the military establishment of the burden of providing for the relocation of persons excluded from military areas and to alleviate increasingly the drain on military resources with respect to all phases of evacuation for relocation (R. 56–57). The agreement further provided that the relocation centers were to be constructed and initially supplied by the War Department; that the War Relocation Authority would operate all centers from the date of opening, including staffing, administration, project planning, and complete operation and maintenance; that the War Department would transport all evacuees to assembly centers and then to relocation centers under military escort; and that in the interest of the evacuees the relocation sites would be designated by

Public Proclamation No. 8 designated the territory included within the exterior boundaries of each center then or thereafter established within the Western Defense Command as a war relocation project area, and required all persons of Japanese ancestry evacuated to such centers to remain therein at all times unless they were specifically authorized to leave by written permission of the Commanding General (R. 58–59).[8] This proclamation was supplemented by a series of restrictive orders defining the boundaries of each relocation center which had been designated and established as a war relocation project area, and requiring all evacuees residing in such centers

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the military commander as prohibited zones and military areas and appropriate restrictions respecting the rights of evacuees and others to enter, remain in, or leave the centers would be issued so that the ingress and egress of all persons would be subject to the control of the responsible military commander, and that each relocation site would be under military police control or protection (R. 57–58). The relocation centers were acquired, completed, and operated in conformity with this agreement, with the exception of Manzanar Relocation Center which was intended essentially for use as a reception center and was operated by the Army during the initial phases of the evacuation until it was transferred by the War Relocation Authority for relocation occupancy on June 1, 1942 (R. 58).

[8] The proclamation also provided that: no persons, except persons of Japanese ancestry and employees of the War Relocation Authority, should enter any such War Relocation Project area except by written authorization from or under the authority of the Commanding General; failure to comply with its provisions would subject violators to the penalties provided by the Act of March 21, 1942, 56 Stat. 173, *supra*, p. 4 (R. 59).

to remain there at all times unless specifically authorized to leave by or under the authority of the Commanding General (R. 59). The restrictive order defining the boundaries of the Manzanar Relocation Project Area was issued October 15, 1942, and the restrictive order defining the boundaries of the Tule Lake War Relocation Project Area was issued September 23, 1942, and amended on January 25, 1943 (R. 59).

Exclusive control of regulating or preventing the entry or movement of any persons of Japanese ancestry in the evacuated areas was retained by the Commanding General (R. 59). However, on August 11, 1942, he delegated authority to the Director of War Relocation to control entry to and departure from the relocation centers (R. 59). This authority was in turn redelegated to each center director (R. 59). Excepted from this delegation of authority by the Commanding General was any right or authority to release evacuees for the purpose of returning to excluded or evacuated areas (R. 59). Thus, subsequent to August 11, 1942, the military authorities exercised no control over ingress and egress in relocation centers located outside of the evacuated zone, save the function of the military police in preventing entries and departures not authorized by the center director (R. 59). However, the two centers involved in the instant action, Tule Lake and Manzanar, were both situated in the evacuated zone; with respect to them, the Commanding General

regulated conditions of travel and movement throughout the area (R. 59). The result of this arrangement was that when the center directors at Manzanar or Tule Lake decided to release an evacuee for private employment, the Commanding General issued a travel permit covering that portion of travel performed in the evacuated zone (R. 59–60). This permit prescribed that travel should be over a stated route and under military escort (R. 60).

The shipments here involved, consisting of foodstuffs, household furnishings, building material and tools, and agricultural equipment and supplies,[9] were delivered to the Tule Lake and Manzanar Relocation Centers between July 28, 1942, and November 8, 1943 (R. 60). Petitioner, as delivering carrier, submitted its bills, aggregating $29,486.46, to the Government, computed at the lowest applicable commercial rates without land-grant deductions in effect at the time the ship-

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[9] The shipments consisted of articles described in the bills of lading as tractors, latrines, wheelbarrows, tools, foodstuffs, lumber, fuel, wood, teaspoons, nails, rope, towels, gloves, furniture, sewing machines and sewing machine parts, paint brushes, bulletin boards, tarpaulins, rubber mats, blacksmith's coal, nonfiction and fiction books, mopheads, prepared roofing, pullet and chick scratch, oak barrels, cotton bags and twine, toilet paper, electric motors, pump heads and equipment, newsprint paper, laundry soap, terra-cotta sewer pipe, pottery-making machinery, stationery and office supplies, art supplies, colanders, earthenware and glassware, cryolite dust and calcium arsenate dist., blankets, and wooden hampers for vegetable shipping (R. 60).

ments were made (R. 4, 60–61). The United States, claiming that under Section 321 (a) of the Transportation Act of 1940 (Appendix A, *infra*, p. 20), each shipment was entitled to move at land-grant rates, deducted the difference between the commercial rates and the land-grant rates and paid petitioner $21,949.18 (R. 4, 61). Petitioner thereupon brought this suit in the Court of Claims to recover $7,537.28, the sum of the deductions (R. 6). The court below found that these shipments were military property of the United States moving for military and not for civil use within the meaning of Section 321 (a) of the Transportation Act (R. 61). It held that the land-grant deductions were properly taken by the United States and, accordingly, dismissed the petition (R. 66).

ARGUMENT

The single issue presented by this case, whether the particular shipments here involved were "military or naval property of the United States moving for military or naval and not for civil use," is one which has been determined in accordance with the principles recently announced by this Court, and we submit that it warrants no review.

1. This case, like *United States* v. *Powell*, No. 56, this Term, *United States* v. *Atlantic Coast Line Railroad Co.*, No. 57, this Term, and *Northern Pacific Railway Co.* v. *United States*, No. 400, this Term, decided March 3, 1947, involves the ap-

plication of the provision of Section 321 (a) of the Transportation Act of 1940 which reserved to the United States land-grant deductions on military or naval property of the United States moving for military or naval use. Petitioner contends that these shipments of Government-owned property to relocation centers, intended for the operation of the centers and for the maintenance of the persons held there, were not entitled to move at land-grant rates (Pet. 8–14). In support of this argument, it is asserted that the War Relocation Authority, the purchaser and consignee of the materials delivered by petitioner, is a civilian agency of the Government (Pet. 8–10); that the materials shipped were civilian in character and intended for civilian use (Pet. 10–12); and that under the rule of the *Powell* case, the terms "civil" and "military", as used in Section 321 (a) are to be construed in the ordinary sense (Pet. 12–14). This argument is not tenable; its fallacy is apparent upon a consideration of the military operations which gave rise to the instant suit, and the applicable principles of law heretofore announced by this Court.

The program for the compulsory evacuation of Japanese and Japanese-Americans from the West Coast and their subsequent detention in the relocation centers pending their resettlement has been reviewed in *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; and *Ex parte Endo*, 323 U. S. 283, and

it cannot well be doubted that this was a military operation. The constitutionality of the major phases of this program was upheld solely on the grounds that it was a military measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion. *Hirabayashi* v. *United States, supra,* at pp. 94–99, 101–104; *Korematsu* v. *United States, supra,* at pp. 218–220, 223; *Ex parte Endo, supra,* at pp. 300–302. Further, the entire evacuation program originated with the Commanding General of the Western Defense Command and was carried out pursuant to his orders. His authority, of course, stemmed from Executive Order No. 9066, Appendix B, *infra,* pp. 21–22, approved by Congress by the Act of March 21, 1942, 56 Stat. 173, *supra,* p. 4. *Korematsu* v. *United States, supra,* at pp. 216–217. Neither the Executive Order nor the subsequent Act of Congress, however, specifically ordered evacuation or established any standard to which the orders of the military commander must conform other than the necessity of protecting military resources in the designated military area against sabotage and espionage. *Hirabayashi* v. *United States, supra,* at p. 103. It is obvious that the detention of the evacuees at the relocation centers was an inherent and integral phase of their evacuation and was considered to be necessary to the successful operation of the

entire program. *Ex parte Endo, supra,* at p. 301. See *Korematsu* v. *United States, supra,* at p. 222. The court below correctly held that the military effort did not cease at the moment the evacuees were escorted from the prohibited areas, but that it extended to the relocation centers. The military arm was not relaxed after the evacuees were relocated (R. 65–66).[10]

From the foregoing, it is clear that the shipments which are the subject matter of this controversy were military property moving for military and not civilian use. The *Powell* case, upon which petitioner relies, stated the general rule that, in applying the exception of Section 321 (a) of the Transportation Act, the terms "civilian" and "military" were to be construed in their ordinary sense (see *supra,* p. 13), but this was specifically recognized as a starting point only, and the breadth of the category "military or naval

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[10] Compare the furnishing of supplies to civilians in the "wake of battle" and the satisfying of needs in liberated and occupied areas arising from military operations. The Military Appropriation Act, 1945, 58 Stat. 573, 593, and the Military Appropriation Act, 1946, c. 265, 59 Stat. 384, provided that appropriations for the military establishment for the respective fiscal years shall be available "for food, clothing, medicine and other items to meet urgent civilian needs in occupied and such other areas as may be determined by the Secretary of War to be important to military operations of the United States." Cf. Military Appropriation Act, 1947, Public No. 515, 79th Cong., 2d Sess., "Government and Relief in Occupied Areas."

property" of the United States "moving for military or naval * * * use" was critically examined in the companion *Northern Pacific Railway Co.* case, and the governing principles elaborated. It was held that the controlling factor under Section 321 (a) was the relation of the shipment to the military and naval effort, and not the nature of the goods themselves or the status of the person or agency handling the materials. *Northern Pacific Railway Co.* v. *United States, supra,* slip opinion, pp. 4–5; see *Southern Pacific Co.* v. *Defense Supplies Corp.,* 64 F. Supp. 605, 607 (N. D. Calif.).

Thus, the mere fact that the War Relocation Authority was established as a "civilian" agency of the Government is of no importance in determining whether these shipments were entitled to move at land-grant rates. In the circumstances of this case, it is clear that the Authority was acting as an adjunct to the military. Its mission was the continued prevention of possible sabotage and espionage, particularly in view of the chance of enemy invasion, as well as the working out of the direct and immediate effects of the evacuation orders issued by the Commanding General. The direct relation between the War Relocation Authority's activities and the Commanding General's evacuation program is indicated by the fact that authority to release evacuees for the purpose of returning to excluded areas was not relinquished

by the Army (R. 59–60, 65), even after the decision of this Court in the *Endo* case.[11]

Nor is the fact that the supplies involved were essentially "civilian" in character determinative of the issue presented, for "military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, * * *." *Northern Pacific Railway Co.* v. *United States, supra,* slip opinion, p. 5. That the property in question was intended for the maintenance of the detainees and for the operation of the relocation centers does not detract from its status as military property. Petitioner's emphasis on the civilian status of the War Relocation Authority tacitly concedes that the food and materials shipped to the assembly centers, which were admittedly constructed and maintained exclusively by the Army

[11] Coincident with the *Endo* decision, the Commanding General withdrew the orders which had barred the return of citizens, regardless of their loyalty, to the military areas, leaving only those individually deemed to be potentially dangerous to be excluded. 10 Fed. Reg. 53. The Army did not concede the binding validity of the War Relocation Authority's determinations of loyalty but stated that officers would tour the Authority's camps, examine the Authority's records, and compile an exclusion list. Dembitz, *Racial Discrimination and the Military Judgment*, 45 Col. L. Rev. 175, 221. Despite the Authority's loyalty clearance, detainees were barred by the Commanding General from returning to any part of the evacuated areas. 7 Fed. Reg. 4498. The War Relocation Authority regulations prohibited releases for detainees barred by the military authorities. 9 Fed. Reg. 154.

in order to care for the evacuees pending their transfer to the relocation centers, was military property moving for military use. Such a concession is inescapable. Certainly an Army camp does not cease being a military one by reason of housing nurses, USO personnel, war correspondents, prisoners of war, or evacuees, as distinguished from troops. We submit that there is no rational basis upon which assembly centers can be distinguished from relocation centers. The detention contemplated at the latter, although somewhat longer than at the former, was intended to be temporary. Both types of camps were merely "steps in a complete evacuation program." *Korematsu* v. *United States, supra,* at p. 222; *Ex parte Endo, supra.* at p. 301.

2. The issue presented by this case is not one of general national importance. By the Act of December 12, 1945, Appendix A, *infra,* p. 20, Section 321 (a) of the Transportation Act was amended, and that portion of the Act reserving to the United States land-grant rates on Government military property moving for a military use was stricken, effective October 1, 1946. Shipments of Government property, both military and civilian, based on contracts entered into subsequent to that date, now move at full commercial rates. As we have indicated above, *supra,* pp. 15–17, the proper tariff for shipments of Government property based on contracts entered into prior to October 1, 1946 is to be determined in accord-

ance with the general principles which have recently been fully established in the *Powell* and the *Northern Pacific Railway Co.* cases.

3. Petitioner urges that the court below erred in failing to make adequate and correct findings of fact (Pet. 8). In general, the findings which petitioner requested would merely tend to show that the War Relocation Authority was a civilian agency of the Government. This, of course, is immaterial in the circumstances of this case. See *supra,* p. 17. In any event, it is clear that the decision is adequately supported by the findings.

CONCLUSION

The decision of the court below is clearly correct and accords with the decisions of this Court. We respectfully submit that the petition for writ of certiorari should be denied.

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JUNE 1947.

APPENDIX A

1. Section 321 (a) of the Transportation Act of 1940 (49 U. S. C. 65 (a)) provides in part:

> Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *.

2. The Act of December 12, 1945, 59 Stat. 606 (49 U. S. C., Supp. V, 65 (a)) provides in part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That subsection (a) of section 321 of title III, part II, of the Transportation Act of 1940, be, and the same is hereby, amended by striking out the following: "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

APPENDIX B

Executive Order No. 9066 of February 19, 1942, provides in pertinent part:

> Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):
>
> Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be

necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

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U. S. GOVERNMENT PRINTING OFFICE: 1947